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No. 85-98

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ANSCHUETZ & CO., GMBH,
Petitioner,

v.

MISSISSIPPI RIVER BRIDGE AUTHORITY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The court of appeals in this case ruled that U.S. courts need pay no attention to the procedures of the Hague Evidence Convention in ordering production of documents or testimony from abroad, provided only that the production occur in the United States. In arguing that this Court should not grant certiorari to review this decision, respondent does not question the obvious importance of the issue—an importance recently reaffirmed by the governments of Germany, France and Great Britain, all of which have urged that the Court grant certiorari.[1] Nor

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[1] The Federal Republic of Germany filed an amicus brief in this Court on August 1, 1985, supporting the petition for certiorari and confirming that the evasion of Hague Evidence Convention procedures authorized by the court of appeals "violates the Convention and infringes upon German sovereignty." German Amicus Brief at

does respondent take issue with petitioner's claim of conflicts within the state and lower federal courts over the issue presented here, conceding that the conflicting decisions on the issue have created "confusion in the jurisprudence concerning the scope of the Hague Evidence Convention." Opp. at 9.

Instead, respondent presents only two arguments against the Court's reviewing the decision below: (1) that petitioner allegedly "waived" its rights under the Hague Evidence Convention by providing discovery in response to earlier requests; and (2) that the court of appeals decision was correct. Neither of these arguments has merit.

1. Respondent made precisely the same "waiver" argument to the court of appeals that it makes here. That court did not regard the argument as sufficiently serious to warrant discussion in the course of its lengthy opinion on the merits of the question presented by this case—namely, what role the Hague Convention should play in U.S. litigation.

The court of appeals was correct in declining to give credence to respondent's claim of waiver in this case. Petitioner cannot be said to have waived its claims under the Hague Evidence Convention where the evidence

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2. France filed a diplomatic note to the U.S. Department of State on August 4, 1985, expressing its hope that this Court will consider the case. The British government similarly filed a diplomatic note to the State Department on August 21, 1985. In its note, Great Britain stated that U.S. courts "have thus far given differing interpretations to the Convention" and that "the issue may be arising in a significant number of cases affecting British parties to U.S. litigation, as well as other parties." The British government accordingly expressed its opinion that it would be "valuable if the Supreme Court were to take the opportunity offered by the present case to reach a decision which . . . would resolve the present uncertainty in U.S. procedures." (Copies of the French and British notes, together with an informal translation of the former, are attached to this Reply.)

involved has not been produced, where petitioner objected to the respondent's request from the very beginning, and where petitioner presented its claims under the Hague Evidence Convention to the trial court by way of a motion for a protective order. The fact that petitioner voluntarily produced other evidence to the respondent has nothing to do with its assertion of its Hague Evidence Convention claims with respect to the evidence at stake here,[2] as nothing in the Hague Evidence Convention constrains a party's right voluntarily to produce information from abroad.[3] Nor can petitioner's compliance under protest with the district court's order that it produce one of the several people requested for deposition in Germany be counted against petitioner where respondent expressly agreed—both in writing before the deposition and on the record at the deposition itself—that the production of this one witness would not constitute a waiver of petitioner's remaining Hague Evidence Convention claims.

Respondent's authorities concerning waiver support, rather than contradict, the court of appeals' treatment of the issue in this case. These authorities involve Federal Rules of Civil Procedure that, unlike the Rule involved here, expressly provide that certain claims will be waived unless raised at some particular, early point. Thus, for example, Rule 8(h) expressly provides that defenses of personal jurisdiction and venue are waived unless raised at the very outset of a proceeding. Similarly, Rule 37(d) provides that a court cannot consider defenses or objections to discovery requests if the party utterly failed to

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[2] *See Pierburg GmbH & Co. KG v. Superior Court*, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982) ("a civil litigant . . . cannot 'waive' the applicability of the Hague Evidence Convention by failing to assert noncompliance with that Convention as to prior discovery").

[3] Indeed, the Convention explicitly provides for the voluntary production of evidence from abroad. *See* Appendix at 51a-54a.

answer or object to the requests.[4] In the present case, however, the petitioner has objected and continues to object to producing evidence. Respondent can point to no authority that in such circumstances the court of appeals erred in accepting and ruling on petitioner's arguments on the merits. The court of appeals having done so, the issue is now properly presented to this Court for decision.

2. Beyond contending that petitioner somehow waived its right to refuse to make discovery of certain evidence except pursuant to the Hague Evidence Convention, respondent argues that certiorari should be denied in this case simply because the court of appeals reached the correct result.[5] Even if this were true, of course, it would in no way argue against the Court's granting certiorari to resolve a direct conflict among lower federal and state courts over a recurring issue of increasing importance to the administration of justice.

In truth, however, the court of appeals was plainly wrong. In response to the reasons presented in the Pe-

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[4] This was what happened in *Cooper Industries, Inc. v. British Aerospace, Inc.*, No. 83 Civ. 6366, slip op. (S.D.N.Y. Aug. 28, 1984), cited by respondent (Opp. at 7). The other case cited by respondent (*Murphy v. Reifenhauser KG Maschinenfabrik*, 101 F.R.D. 360 (D.Vt. 1984)) did not, contrary to respondent's suggestion, include waiver as a "factor influencing the court's decision" and therefore is totally inapposite.

[5] Respondent also attempts to argue that the fact that this Court denied certiorari in *Club Mediterranee, S.A. v. Dorin*, 105 S. Ct. 286 (1984) (appeal dismissed and cert. denied) and *Volkswagenwerk A.G. v. Falzon*, 104 S. Ct. 1260 (appeal dismissed), *reh. denied*, 104 S. Ct. 1932 (1984), argues against the grant of certiorari in this case. Quite apart from the well-established principle that denial of certiorari is of no precedential weight (*See* R. Stern and E. Gressman, Supreme Court Practice § 5.7 (5th ed. 1978)), this argument is fundamentally flawed because of the particular problems with the procedural posture of those two cases that made Supreme Court review there inappropriate, as was pointed out in the Petition for Writ of Certiorari in this case (at 9-12).

tition as to why the court of appeals was in error, respondent makes three points. First, respondent claims that it is "extremely questionable" whether "any discovery" can be obtained from German litigants in light of Germany's "express declaration not to execute request[s] for information . . . where the purpose of the request is pretrial discovery." Opp. at 11-12. Contrary to respondent's statement, the reservation to which respondent refers applies only to documents (not to depositions or interrogatories) and was expressly contemplated by the United States and other signatories to the Convention under Article 23. Other Convention signatories have construed similar reservations to require only sufficient specificity with respect to the documents sought. Evidence (Proceedings in Other Jurisdictions) Act, 1975 (c. 34) (England). In short, there is every reason to accept the representation of the German government that the Convention, if used, will provide a meaningful tool for U.S. litigants to obtain discovery from abroad. German Amicus Brief at 7.

Next, respondent contends that because resort to the Hague Convention procedures may not yield all the discovery that the U.S. court ultimately will require, using the procedures in the first instance and then ordering the discovery directly is a greater affront to the foreign sovereign involved than not using the procedures at all. Opp. at 12. Notwithstanding respondent's apparent solicitude for the sovereignty of foreign governments, it is simply bizarre to suggest that foreign governments would rather not be consulted before their sovereign interests are invaded. Such a view is, moreover, directly contradicted by Germany's representations in its amicus brief: Before ordering the removal of evidence from Germany, "the [U.S.] court should be required, in accordance with the principle of international comity, to first apply the methods for taking evidence abroad to which the United States and the Federal Republic of Germany have agreed under the Convention." German Amicus Brief at 7.

Finally, after contending that U.S. courts should not consult with foreign authorities out of deference to those authorities, respondent claims that those who choose to do business in the United States should be subject to United States rules and that requiring a party to ship its documents and employees to this country from abroad is not discovery from abroad because it is nothing more than "gathering of evidence within [the] jurisdiction" of the United States. Opp. at 13. As an initial matter, it seems ironic that respondent would characterize petitioner as someone who "chose to do business in the United States" merely by furnishing some steering gear from Germany to be installed in a Spanish ship being built in Spain. More fundamentally, however, respondent's argument misses the point. Petitioner does not contend that it should not be subject to the rules of the United States; the question is what those rules are and whether they include, with respect to evidence located abroad, the requirement that Hague Evidence Convention procedures be used. Convention procedures are fully applicable to all productions, wherever they take place, that require foreign nationals to take actions within the territory of their sovereign that may invade rights granted to them by that sovereign. To say that making the foreign national bring the documents or witnesses to the United States removes the foreign sovereign's legitimate concerns is to make a mockery of the fundamental principle of comity in international legal relationships.

From the earliest times, following the principle of comity, U.S. courts have respected and given effect to the laws of other sovereigns, to the extent that doing so would not unduly prejudice U.S. interests. This consideration by domestic courts of foreign legal interests and international system needs is essential to the functioning of the "international legal order." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346, 3360 (1985); *see generally* Maier "Extraterritorial Jurisdiction at a Crossroads: an Intersection Between Public

and Private International Law," 76 Am. J. Int'l L. 280 (1982). The principle of comity is founded on "mutual interest and utility, a sense of the inconveniences which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return." Story, Commentaries on the Conflict of Laws 33 (Bigelow ed. 1883). Would the United States have no concern over a German court's ordering production of a U.S. citizen's confidential disclosures in Chicago to her U.S. lawyer, so long as the production occurred in Frankfurt? Would U.S. concern over a Japanese court's order for production of business secrets from a U.S. corporation in Silicon Valley vanish as soon as it was made clear that the production would occur in Tokyo? Respondent's argument, like the decision of the court of appeals, is an evasion of, not an answer to, the important question presented by this case.

Respectfully submitted,

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August 30, 1985

APPENDIX

Ambassade de France
aux Etats-Unis

Washington, le 4 Août 1985

L'Ambassade de France présente ses compliments au Département d'Etat et a l'honneur de lui faire savoir ce qui suit :

L'attention du Gouvernement français a été appelée sur deux arrêts de la cour d'appel du cinquième circuit : l'affaire 84-3286 du 7 mars 1985 Anschuetz and Co., GMBH et l'affaire 84-1877 Messerschmitt Bolkow Blohm, GMBH, qui mettent en cause l'application de la convention de la Haye du 18 mars 1970 sur l'obtention des preuves à l'étranger en matière civile ou commerciale, à laquelle la France comme les Etats-Unis sont parties.

Selon les information en possession des autorités françaises, les défendeurs demandent que ces arrêts soient examinés par la Cour Suprême et ont introduit à cette fin une requête devant la cour (writ of certiorari).

Le gouvernement français souhaite que la Cour Suprême inscrive ces duex affaires à son rôle./.

L'Ambassade de France saisit l'occasion de la présente note pour renouveler au Département d'Etat les assurances de sa très haute considération.

Département d'Etat
Washington D.C. 20520

August 20, 1985

Embassy of France
to the United States

Washington 4th August 1985

The Embassy of France presents its compliments to the Department of State and has the honor to refer it to the following:

The attention of the French Government has been drawn to the two judgments of the U.S. Court of Appeals for the Fifth Circuit: case no. 84-3286 of 7th March 1985 Anschuetz and Co., GMBH and case no. 84-1877 Messerschmitt Bolkow Blohm, GMBH, which are concerned with the application of the Hague Convention of 18th March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, to which both France and the United States are parties.

According to the information in the possession of the French authorities, the defendants are requesting that these judgments be examined by the Supreme Court and have therefore filed a request before the Court (writ of certiorari).

The French Government hopes that the Supreme Court will enter these two cases on its roll.

The Embassy of France avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Department of State
Washington, D.C. 20520

Note No. 129

Her Britannic Majesty's Embassy present their compliments to the Department of State and have the honour to draw its attention to the petition for a writ of certiorari filed in case number 85-98, Anschuetz and Co GMBH v Mississippi River Bridge Authority et al before the Supreme Court of the United States.

The Department of State will be aware that the relationship between the procedures established by The Hague Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters and other methods of obtaining evidence was discussed at length by experts attending the second meeting of the Special Commission on the Operation of the 1970 Convention held from 28 to 31 May 1985 at The Hague, and that the experts concluded unanimously that the use of the Convention should be encouraged, since its use can help to avoid conflicts arising from the application of statutes prohibiting the production of evidence in national territory (report on the second meeting, pages 24-27).

However the Courts of the United States have thus far given differing interpretations to the Convention, some have taken the position that the procedures of the Convention must or should be followed while others have held, as the Court of Appeals did here, that the procedures need not be applied when the United States Court orders the evidence to be taken from the foreign country's territory and brought to the United States for production. Furthermore, several inquiries from interests in the United Kingdom indicate that the issue may be arising in a significant number of cases affecting British parties to US litigation, as well as other foreign parties. It would therefore in the opinion of HMG be valuable if the Supreme Court were to take the opportunity offered by the present case to reach a decision which met the concerns expressed by the Special Commission at The Hague

in May and would resolve the present uncertainty in US procedures.

Her Britannic Majesty's Embassy would be obliged if the Department of State could take the above views into account in formulating its position towards the present petition.

Her Britannic Majesty's Embassy avail themselves of the opportunity to renew to the Department of State the assurances of their highest consideration.

[SEAL]

British Embassy
WASHINGTON

21 August 1985